(22)

Nos. 721-722

# In the Supreme Court of the United States

OCTOBER TERM, 1945

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA; JOHN MANNINGER, COUNTY TREASURER, AND ALVIN [illegible], AS ASSESSOR OF PAWNEE COUNTY, STATE OF OKLAHOMA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT*

BRIEF FOR THE UNITED STATES

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BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA; JOHN MALTSBERGER, COUNTY TREASURER, AND AMOS TETER, TAX ASSESSOR OF PAWNEE COUNTY, STATE OF OKLAHOMA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the circuit court of appeals (R. 71–79) is reported in 139 F. 2d 248.

### JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered November 26, 1943 (R. 79). The petition for a writ of certiorari was filed February 22, 1944. The jurisdiction of this Court is invoked under section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the Act of August 21, 1937, 50 Stat. 738, amending section 24 of the Judicial Code, 28 U. S. C. § 41 (1), deprived the district court of jurisdiction to entertain a suit by the United States to enjoin the taxation of its property by county taxing authorities.

2. Whether the Oklahoma Indian Welfare Act of June 26, 1936, involves an unconstitutional delegation of legislative power to the Secretary of the Interior.

3. Whether the lands in question were properly acquired by the United States in accordance with the Oklahoma Indian Welfare Act.

4. Whether the property in question was taxable for the year 1940.

## STATUTES INVOLVED

Section 1 of the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501, and the pertinent provisions of section 24 of the Judicial Code as amended, 28 U. S. C. § 41 (1), appear at pp. 3, 6, 17, *infra;* the pertinent provisions of section 15.49, Title 68, Oklahoma Statutes, 1941, are set out at p. 8, *infra.*

## STATEMENT

This is a suit by the United States to restrain the collection of certain *ad valorem* taxes as-

sessed upon its property by petitioners, the taxing authorities of Pawnee County, Oklahoma. The material facts, as disclosed by the record, follow:

Colonel Moore and Dollie Moore, his wife, full-blood Pawnee Indians, by deeds dated October 19, 1939, conveyed to the United States in trust for each of their three minor children, also full-blood Pawnees, certain tracts of agricultural and grazing land in Pawnee County, Oklahoma (Exs. A, B, C, D; R. 11–15, 20, 21). While the children do not live on or till these lands, but reside at home with their parents, the properties are rented and the proceeds used for the support of the children (R. 20). The children do not own any real estate (R. 30). Each deed was approved by the Department of the Interior on August 7, 1940 (R. 19). The conveyances were made pursuant to the terms of section 1 of the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501, which reads:

> * * * the Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided,* That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for

> whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid.

The lands covered by these deeds were owned by Colonel Moore prior to the date of the conveyances, and from the time he acquired them he had paid all taxes accruing thereon (R. 20–21). Notwithstanding the provisions of the Oklahoma Indian Welfare Act, the county taxing authorities, after the lands were conveyed to the United States, retained them on the tax rolls of the county and assessed *ad valorem* taxes thereon for the years 1940 and 1941, demanded payment of the taxes so assessed and indicated their intention to continue to demand payment of future taxes assessed on these lands (R. 9, 15).

The United States, on October 27, 1941, filed its complaint in the District Court of the United States for the Northern District of Oklahoma, seeking to have the property decreed tax exempt

for 1940 and so long thereafter as title is held by the United States, and to have these lands stricken from the tax rolls of Pawnee County (R. 6–11). Injunctive relief to accomplish this purpose was asked (R. 10–11).

On January 12, 1943, the district court entered judgment granting the relief prayed for, except that it held the property taxable by Pawnee County for the year 1940 (R. 25–27).

Petitioners appealed from said judgment in so far as it adjudged the lands to be nontaxable beginning with the year 1941, and the United States cross-appealed from the judgment in so far as it held the property taxable for the year 1940. The circuit court of appeals held that the district court had jurisdiction of the action, and on the merits found that the Oklahoma Indian Welfare Act was constitutional, and that the land had been lawfully acquired by the United States under that Act. The court further found that the approval of the deeds by the Secretary in 1940 related back to October 19, 1939, the date of their execution, that the tax-exempt status attached to the lands as of that date, and that they were therefore nontaxable beginning with the year 1940 (R. 71–78). The judgment of the district court, as so modified, was affirmed (R. 79).

## ARGUMENT

1. Petitioners assert that the district court was without jurisdiction of this suit because of the

1937 amendment to section 24 of the Judicial Code (28 U. S. C. § 41 (1)), which provides:

> Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

We submit, however, that the amendment does not apply to the instant case. The first paragraph of the same section of the Judicial Code (the text of which is set forth in the Appendix, *infra*, pp. 17–18) explicitly provides that the district courts shall have jurisdiction of "all suits of a civil nature, at common law or in equity, brought by the United States." It further grants jurisdiction of suits where the matter in controversy exceeds $3,000, and either arises under the Constitution or laws of the United States or is between citizens of different states. The amendment, if applied to the United States, would plainly lessen and diminish its remedies. And since the United States is not specifically named in the amendment, it is not bound by it because of the rule that the sovereign is not bound unless expressly named. *Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554-555; *Springfield* v. *United States*, 99 F. 2d 860, 862 (C. C. A. 1), certiorari denied, 306 U. S. 650.

Moreover, the legislative history of the amendment shows that it was directed primarily against suits brought by foreign corporations under the diversity of citizenship clause to enjoin collection of state taxes, with the consequent disadvantage to the states of being deprived of tax revenue pending the litigation in the federal courts of the question of tax liability. See S. Rep. No. 1035, 75th Cong., 1st Sess., which was incorporated in H. Rep. No. 1503, 75th Cong., 1st Sess. There is thus nothing in the object sought to be attained or in the mischief sought to be remedied by the legislation from which there can be imputed to Congress an intent to limit the right of the United States to resort to its own courts for protection against imposition of unlawful state taxes on federal property. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554–555; Gov't Br. in Opp. in *Springfield* v. *United States*, No. 662, October Term, 1938, certiorari denied 306 U. S. 650.

In any event, even if the 1937 amendment applies to the United States, the court below correctly held that no plain, speedy, and efficient remedy is available to the United States under the laws of Oklahoma. Since, as the court pointed out (R. 74, 75), the remedy at law is conditioned upon prior payment of the taxes assessed, such a remedy is clearly inadequate. *United States* v. *Rickert*, 188 U. S. 432, 444; *Springfield* v. *United States*, 99 F. 2d 860, 862

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(C. C. A. 1, 1938), certiorari denied 306 U. S. 650. Indeed, petitioners appear to concede this (Pet. 20, 21), but they insist that the court below failed to consider the availability of possible remedies in equity. In this connection petitioners cite certain provisions of section 1397, Title 12, Okla. Stats. (1941) and section 15.49, Title 68, Okla. Stats. (1941) (Pet. 21). The first of these provisions is of a general character; the authority of the state court to grant an injunction in the cases named is permissive and not mandatory; and clearly, so far as injunctive relief against the illegal levy of a tax is concerned, the authority of the court is qualified by the terms of section 15.49, Title 68, Okla. Stat., which provides, so far as here material, that:

> The proceeding before the Boards of Equalization and appeals therefrom, shall be the sole method by which assessments or equalization shall be corrected or taxes abated. Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made.

Since it is the contention of petitioners that the property in question, to which the United States has acquired title, is nevertheless taxable, it seems clear that no equitable remedy is available under this section and, contrary to petitioners' assertion, the circuit court of appeals so construed the state law (R. 75). In any event, it

cannot be said that the state law affords a *plain* remedy readily available to the United States.

As noted by the circuit court of appeals (R. 75), this suit involves the construction and application of a federal enactment. Indeed, all suits in which the United States seeks to free its property from attempted exercise by the states of the taxing power necessarily involve primarily a federal question; and the court correctly pointed out that Congress disclosed no intention to prevent determination of such questions by federal courts.

2. The circuit court of appeals correctly held that section 1 of the Oklahoma Indian Welfare Act does not involve an unconstitutional delegation of legislative power. The Secretary of the Interior has long been the administrative arm of the federal Government in the field of Indian affairs and has been given wide discretion in the enforcement of declared Congressional policy. R. S. 441, 5 U. S. C. 485; Act of May 27, 1908, 35 Stat. 312, section 1; *United States* v. *Rickert*, 188 U. S. 432; *Anicker* v. *Gunsburg*, 246 U. S. 110. The statute here under consideration does not vest the Secretary with unlimited discretion. It authorizes the acquisition of "agricultural and grazing lands of good character and quality", and they must be "in proportion to the respective needs of the particular Indian or Indians." Congress has thus directed the Secretary that lands

may be acquired for needy Indians, has specified the type of lands—agricultural and grazing—and has provided that they must be adapted to the needs of the Indian or Indians for whom they were acquired. The policy of Congress is clear, and adequate standards for its enforcement have been furnished.[1] Congress could not itself undertake to select specific lands or the particular Indians for whom to acquire them, and of necessity had to vest this authority in an administrative officer or body. It legislated "as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute" and laid down the appropriate "primary standards" for administration action. *Buttfield* v. *Stranahan,* 192 U. S. 470, 496. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, chiefly relied upon by petitioners, is not a departure from the rule of earlier cases. The opinion in that case expressly approved the language above quoted from *Buttfield* v. *Stranahan, supra.* The *Panama Refining Co.* decision is significant here only to the extent that it establishes that, where a statute regulates the ordinary business activities of citizens, and seeks to enforce such restrictions by the imposition of legal sanctions, delegated authority will be carefully scrutinized by the courts. Where as here,

[1] Cf. section 5 of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 985, 25 U. S. C. 465.

a statute deals with subject matter peculiarly appropriate for Government control, the courts have permitted a wide latitude to Congress in delegating authority to administrative officers. See *Buttfield* v. *Stranahan*, 192 U. S. 470 (foreign commerce); *United States* v. *Grimaud*, 220 U. S. 506 (regulation of forest reserves); *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304 (arms export embargo); *Dow* v. *Ickes*, 123 F. (2d) 909 (App. D. C. 1941), certiorari denied, 315 U. S. 807 (establishment of fishing areas). The authority delegated to the Secretary of the Interior by the Oklahoma Indian Welfare Act is therefore a valid exercise of legislative power.[2]

3. The Secretary of the Interior, in the acquisition of the lands here involved, acted properly in accordance with the statute. Petitioners contend

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[2] Petitioners complain (Pet. 22) that the Act contains no limitation upon the amount of land which the Secretary may acquire. The Secretary is, of course, limited by the amount of money which Congress appropriates for this purpose and by the amount of land which others are willing to give. Secondly, by the Act of May 19, 1937, 50 Stat. 188, Congress dealt with the identical question arising under the Act of June 20, 1936, 49 Stat. 1542, by limiting the tax exemption on lands purchased with restricted funds to one hundred and sixty acres. See *Board of Comm'rs* v. *Seber*, 318 U. S. 705, 713. A similar limitation on tax exempt allotted land was incorporated in the Act of May 10, 1928, 45 Stat. 495. The question whether, in the light of these statutes, a similar limitation should be read into the Oklahoma Indian Welfare Act need not be here considered since the acreage acquired for each of the minor Indians is well within that limitation (R. 11–14).

(Pet. 26) that the principal purpose of the transfers was not to serve the interests of the minor Indians for whom the lands were acquired, "but to effect a removal from the tax rolls of some of his [Colonel Moore's] land and relieve him of the tax burden". Both the district court and the circuit court of appeals rejected this contention. Petitioners acknowledge (Pet. 5) that Colonel Moore's economic situation had reached the point where he could not carry the tax burdens imposed upon him. In this situation he expressed a desire to convey certain tracts to the United States in trust for his children under the act in question (Def. Ex. 1, R. 31). The subsequent exhibits in the record (R. 32–46) establish that such relief was afforded to Colonel Moore as could properly be given under Federal law; and if the properties remaining were lost through foreclosure, his minor children would suffer greatly thereby since there would then be no possibility of their inheriting such lands. The acquisition of these properties by the United States assured the minor Indians of the eventual enjoyment of these lands, and was clearly in their interest. The presumption of good faith on the part of the Secretary is thus supported by the record, and both courts below correctly ruled that the Secretary's action was a proper exercise of the discretion vested in him.

Petitioners further contend that the Act does not authorize acquisition of the lands in question because the Act contemplated acquisition of lands

only for landless Indians who could enter upon and work the lands, and that it forbids the acquisition of lands if they are to be rented. These limitations are neither expressed in the Act itself nor evidenced by its legislative history. While relief for landless Indians was clearly a principal objective of the legislation, the remarks of Senator Thomas, sponsor of the bill (Pet. App. viii.), show that Indians who already had land were also within the intended benefits of the Act. Furthermore, the minor Indians in this case were in fact without other lands (R. 30).[3] Not all Indians are immediately capable of entering upon and tilling the land, and the attention of Congress was called to the necessity of temporarily renting, in some circumstances, lands acquired under the Act.[4] Nor does the subsequent revision of section 6 of S. 2047 (which as amended became section 1 of the statute) indicate a different legislative purpose, as petitioners contend (Pet. App. vii) Congress merely refused to enact into law a provision which would enable an Indian to escape taxation simply by deeding his lands to the United States in trust for himself, and which would recog-

[3] The question of the precise scope of the term "Indian" is not presented in this case. Here the beneficiaries, being full-blooded Indians, are clearly within the terms of the statute.

[4] Testimony of Hon. John Collier, Commissioner of Indian Affairs, before the Committee on Indian Affairs, United States Senate, (Hearings on S. 2047, 74th Cong., 1st sess., p. 22).

nize the right of the Indian to lease the lands to third parties.

With regard to these contentions, the opinion of this Court in *Board of Commrs.* v. *Seber,* 318 U. S. 705, 710, in dealing with a similar contention that the Act of June 20, 1936, 49 Stat. 1542, was limited to lands purchased for landless Indians, is pertinent. This Court stated: "We do not read those remarks [of the sponsor of the bill] as limiting the scope of the 1936 Act to landless Indians; they do not deal in terms of exclusiveness. But if they are to be interpreted as petitioners contend, we do not accept them as definitive, because they are opposed to the clear words of the Act, the reasons for its enactment, its contemporary administrative interpretation, and its subsequent Congressional history." The limitations for which petitioners contend would exclude from the benefits of the Act all minors and all adult Indians who, by reason of physical infirmities or other disability, could not immediately occupy and work the lands. Congress obviously did not intend that these Indians, who might be most in need of help, should be excluded from the benefits of its legislation.

Petitioners further contend that the lands acquired here are not "agricultural and grazing lands of good character and quality" within the meaning of the Act. The selection of the lands being entrusted to the Secretary by the Act, his

determination is not subject to judicial review unless it clearly appears that his action is arbitrary. *Dow* v. *Ickes,* 123 F. 2d 909 (App. D. C. 1941), certiorari denied, 315 U. S. 807; *City of Oakland* v. *United States,* 124 F. (2d) 959 (C. C. A. 9, 1942), certiorari denied, 316 U. S. 679. Moreover, even if it were reviewable, it is simply a question of fact which both courts below have determined adversely to petitioners, and which does not warrant further review by this Court.

4. The lands were properly held non-taxable for the year 1940. As noted by the circuit court of appeals (R. 78), the details of the acquisition to be made had been fully determined and approved by the Commisisoner of Indian Affairs prior to the execution of the deeds, and the Commissioner had not only approved the lands to be acquired, but had prescribed the form of deed to be used. Prior to January 1, 1940, the lien date Colonel Moore, acting upon the advice and with the approval of the Commissioner of Indian Affairs, had divested himself of title, subject to the approval of the Secretary, which in the circumstances was purely formal. All matters upon which he might refuse his approval had already been passed upon. Consequently, this formal approval related back to the date of execution of the deeds, October 19, 1939. *Anchor Oil Co.* v. *Gray,* 256 U. S. 519, 522; *Board of County Commissioners* v. *Seber,* 130 F. 2d 663, 670 (C. C. A.

10, 1942). The decision below is not in conflict with the decisions cited by petitioners (Pet. 29-30). The question of relation back could not arise under the facts in those cases, except in *Board of County Commissioners* v. *Seber,* 130 F. 2d 663 (C. C. A. 10, 1942). And in the latter case, to the extent that the facts permitted, the doctrine of relation back was applied.

### CONCLUSION

While the questions presented may be important, they were correctly decided by the court below. No conflict of decisions is shown. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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